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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 75-3491

L. W. UMPHRES,

Petitioner,

VS.

SHELL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DALE E. MULLER
7701 North Lamar Blvd.
Suite 206
Austin, Texas 78752

Attorney for Petitioner

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES:

Petitioner, L. W. Umphres, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on April 30, 1975.

Motion For Rehearing En Banc was made to the Fifth Circuit Court of Appeals and was denied on June 23, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears in Appendix "A". It has not yet been reported.

The Order denying the Motion For Rehearing En Banc appears in Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 30, 1975, affirming the directed verdict and take nothing judgment entered by the United States District Court for the Southern District of Texas. The Fifth Circuit Court denied a timely petition for rehearing on June 23, 1975. The jurisdiction of this Court is invoked under 15 U.S.C. Sec. 1254(1).

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QUESTIONS PRESENTED

In affirming a directed verdict against Petitioner, the United States Court of Appeals for the Fifth Circuit relied on two points to show the insufficiency of the evidence needed to reach the jury on the claimed antitrust violations: first, that Petitioner's evidence was insufficient because it was obtained from a limited source - only five out of over 2800 service stations in the Houston area; second, that Petitioner's evidence was insufficient because it did not show specific agreements that would require Petitioner to participate in tie-in arrangements and to follow "suggested" prices. The questions presented by the use of these as a basis for the decision are:

1. Whether the disregarding evidence because of its limited origin is, in fact, passing on the credibility of the evidence before it, contrary to the rule established by the Court in Brady v. Southern Railroad, 320 U.S. 476 (1943).

2. Whether, in requiring evidence of specific agreements to show illegal activity, the Court below is in conflict with the decision of this Court in Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962), that the party opposed to the motion is to be given the benefit of all reasonable inferences which may be drawn from the evidence when viewed in a light most favorable to that party.

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3. Whether the Fifth Circuit Court has effectively denied Petitioner his right to a trial by jury under the Seventh Amendment by deviating from the straight standards established for review of directed verdicts in regard to "reasonable inferences" and passing upon "credibility of evidence".

STATUTES AND RULES INVOLVED

Fed. Rules Civ. Proc. rule 50(a), 28 U.S.C.A.

Sherman Act, 15 U.S.C.A. Sec. 1

Robinson-Patman Act, 15 U.S.C.A. Sec. 13(a)

Clayton Act, 15 U.S.C.A. Sec. 14

Constitution of the United States of America, Seventh Amendment

Note: See Appendix "C" for a full text of these statutes, rules, and amendments.

STATEMENT OF CASE

This is a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, arising from its decision affirming the directed verdict and take nothing judgment of the United States District Court for the Southern District of Texas. The issue directly involved was the correctness of the Trial Court in deciding that Petitioner had failed to introduce evidence sufficient to raise questions of fact (of antitrust law violations) for the jury.

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L. W. Umphres, Petitioner, lessee-operator of four or more Shell service stations, at all times pertinent to this cause of action, in Houston, Texas, instituted this suit against Shell Oil Company under the Sherman, Clayton, and Robinson-Patman Acts on June 24, 1971.

The District Court had jurisdiction of this case under 15 U.S.C.A. Sec. 1337, which provides jurisdiction over civil actions under any law of Congress regulating commerce or protecting trade or commerce against restraints and monopolies.

Pursuant to the orders of the District Court, Petitioner, on November 27, 1972, filed his contentions of grounds of recovery, and following those contentions, Plaintiff's First Amended Complaint was filed on May 14, 1973. A jury was picked on September 10, 1973, and the Court commenced taking evidence on September 11, 1973.

Thereafter, Petitioner called a total of six past and present Shell dealers, including one ex-dealer-representative, each of whom described one or more incidents of the coercive tactics used by the Shell representatives to force the dealers to comply with the entire "Shell program".

The "Shell program" consisted of Shell's suggested retail pricing, Shell's trading stamp and promotional programs (called "Shell games"), and required T.B.A. purchases, all of which were enforced under threat of lease

cancellation. The suggested retail pricing was enforced to such a degree that Shell representatives actually changed the pump prices without the dealers' permission. The "Shell games" and trading stamp promotions increased the dealers' business, labor, and overhead without increasing their profits, solely for Shell's benefit. In private meetings, so that there could be no witnesses, dealers were required to purchase Shell T. B. A. products when they could purchase products of equal quality, salability, and value at a lesser price. Shell even went to the point of cutting off a dealer's supply of the same brand of tires distributed by Shell when he could purchase them at the other source at a more reasonable price. Such coercive tactics were all enforced under threat of cancellation of the dealer's lease and were recapped by the dealer representatives and upper echelon of the company annually with any dissident dealer in their "come to Jesus" meeting (as Shell called it), prior to renewing his lease. Such coercive tactics are clearly in violation of the antitrust laws as pled and interpreted by the Courts of the United States. Some valid, probative evidence of each such allegation was admitted at the trial of this cause. Petitioner also called other witnesses relative to the pricing policies of the major oil companies when bidding for business, as well as a couple of Petitioner's present employees who were also employees of his when he was a Shell dealer.

Respondent (Defendant in the Trial Court), Shell Oil Company, filed its motions for

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directed verdicts at the close of Petitioner's evidence, and by Order entered October 2, 1973, the Honorable Owen D. Cox, Judge, United States District Court, Southern District of Texas, Victoria Division, entered a take nothing judgment against Petitioner.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit Court weighs the credibility of evidence before it in passing upon a motion for directed verdict. This weighing of evidence conflicts with the opinion of this Court in Brady v. Southern Railroad, 320 U.S. 476 (1943) and the Fifth Circuit's own rule established in Boeing Co. v. Shipman, 411 F.2d 365 (1969) en banc. The Fifth Circuit stated that it was following the rule that a Court is not to weigh the credibility of the evidence in passing upon a motion for directed verdict, but clearly did not, placing it in conflict not only with decisions in Brady v. Southern Railroad, supra, and Boeing Co. v. Shipman, supra, but also with the pronouncements of the rule in all other circuits: Rainey v. Gay's Express, Inc., 275 F.2d 451, at 451 (1st Cir. 1960); O'Connor v. Pennsylvania R.R. Co., 308 F.2d 911, at 915 (2nd Cir. 1962); Woods v. National Life and Accident Insurance Co., 347 F.2d 760, at 768 (3rd Cir. 1965); Boleski v. American Export Lines, Inc., 385 F.2d 69, at 74 (4th Cir. 1967); Monroe Auto Equipment v. Heckethorn Mfg. & Supply Co., 332 F.2d 406, at 412 (6th Cir. 1964); Equitable Life Assurance Society of the United States, 382

F. 2d 73, at 73 (7th Cir. 1967); Ahmann v. United Air Lines, Inc., 313 F. 2d 274, at 281 (8th Cir. 1963); Shafer v. Mountain States Telephone & Telegraph Co., 335 F. 2d 932, at 934 (9th Cir. 1964); Continental Baking Co. v. Utah Pie Co., 349 F. 2d 122, at 147 (10th Cir. 1965). To allow this decision to stand is to allow a decision totally contrary to the established rule on weighing evidence on motion for directed verdicts to remain as precedent for future deviations from this rule. This deviation by the Fifth Circuit Court is such that this Court should exercise its supervisory powers over lower Courts to correct it. Additionally, this Court needs to resolve the conflict between this decision and its own prior pronouncement on weighing the credibility of evidence.

In Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962), this Court established the following rule in regard to decisions on motions for directed verdict: "to view the evidence in the light most favorable to Continental (the party opposed to the motion for directed verdict) and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." 370 U.S., at 696. The Fifth Circuit Court failed to adhere to its established rule in its decision, and it clearly deviated from the rule when it stated that in the absence of a written agreement requiring participation in tie-ins, there was insufficient evidence of such illegal tie-ins, despite uncontroverted evidence that such participation

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was, in fact, required, whether written or not. Much evidence was introduced which showed conduct from which an inference could be drawn that violations of the antitrust laws, invoked by Petitioner, had occurred. In effect, the decision alters the rule from one of "all reasonable inferences" to "only those inferences which the Court believes most likely to follow". This excursion by the Court into the fact finding process is clearly proscribed by this Court in Continental Ore Co. v. Union Carbide Corp., supra. This deviation from the established practice in passing upon directed verdicts should be corrected by this Court in the exercise of its supervisory powers and to resolve the conflict between this Court's own prior decision and that of the Fifth Circuit in this case.

Due to the nature of this suit, the importance of the questions presented with regard to the weighing of the credibility of the evidence and failure to give all favorable inferences cannot be overemphasized. Private antitrust actions occupy an important position in enforcement of antitrust laws. The decision of the Fifth Circuit, in effect, limits these actions to direct evidence of violations and to a source of evidence which is broader than a small percentage of the market place. To allow this decision to stand without review leaves a precedent which renders the small business impotent against monopoly activity. Due to limited resources, the broader base of evidence will be impossible to obtain. Further, monopolistic activity may easily be covered to the point where only

testimony of an indirect nature can be given. The decision here limits the inferences which can be drawn by a trier of fact. Such restrictions on the private antitrust suit will result in lessened enforcement of the antitrust laws. To prevent such a result, it is important that this Court review the decision and correct those errors.

The decision of the Fifth Circuit denies the Petitioner his right to a trial by jury, guaranteed by the Seventh Amendment, in that it improperly considers the credibility of the evidence and fails to draw all inferences and presumptions favorable to the Petitioner which could be drawn from the evidence. The standards for granting a directed verdict protect this right to trial by jury where an issue of fact exists. In failing to follow these standards, the Fifth Circuit has effectively denied Petitioner his right to jury trial. This occurs through abuse of the power to grant directed verdicts in proper cases, which was firmly established in Galloway v. United States, 319 U.S. 372 (1943). Such a departure from the mandates of the Constitution requires that this Court review this case and correct the error.

CONCLUSION

For the foregoing reasons, Petitioner urges the Court to issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit entered on April 30, 1975, and upon such review, the Court reaffirm its prior decisions relative to directed

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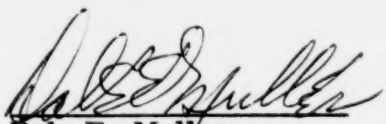
verdicts and reverse the decision of the Trial Court and that of the United States Court of Appeals for the Fifth Circuit and direct that the evidence submitted by Petitioner be sufficient to raise questions of fact to be submitted to a jury.

Respectfully submitted,



Dale E. Muller
7701 North Lamar Blvd.
Suite 206
Austin, Texas 78752

Attorney for Petitioner

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APPENDIX "A"

L. W. UMPHRES,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

No. 73-4006.

United States Court of Appeals,
Fifth Circuit.

April 30, 1975.

Appeal from the United States District Court for the Southern District of Texas.

Before GEWIN, BELL and COLEMAN, Circuit Judges.

PER CURIAM:

Appellant Umphres, a former operator of four retail service stations in the Houston area, brought suit in the District Court alleging that Shell Oil Company, his lessor, had violated various provisions of the Sherman and Clayton Acts, and the Clayton Act as

amended by the Robinson-Patman Act.[1] He contended that Shell had engaged in horizontal price-fixing, vertical price-fixing, price discrimination, and illegal tie-in arrangements with respect to gasoline, trading stamps, customer contests, and tires, batteries, and accessories ("T. B. A."). Appellant also charged that Shell had generally engaged in anticompetitive practices in the form of forcing him to terminate his service station leases.

The District Court granted a directed verdict for Shell after a five day trial, and at the point when Appellant had completed his case in chief. This appeal is from the judgment entered for Shell on the directed verdict. We affirm.

Our standard for reviewing directed verdicts was explicated in Boeing Co. v. Shipman, 5 Cir., (en banc), 1969, 411 F. 2d 365:

> On motions for directed verdict. . . the Court shall consider all of the evidence - not just that evidence which supports the non-mover's case - but in the light and with

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1. Appellant alleged violations of Section 1 of the Sherman Act (15 U.S.C.A. Sec. 1) (horizontal and vertical price-fixing), Section 3 of the Clayton Act (15 U.S.C.A. Sec. 14) (illegal tie-ins), and Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C.A. Sec. 13(a)) (price discrimination). Jurisdiction was alleged on the basis of 15 U.S.C.A. Sec. 15.

> all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. 411 F. 2d at 374.

See also Panotex Pipe Line Co. v. Phillips Petroleum Co., 5 Cir., 1972, 457 F. 2d 1279, affirming a directed verdict in an antitrust case.

(1) Reviewing the record on appeal with the Boeing principles in mind, we conclude that the District Court did not err in granting Shell a directed verdict. Appellant's evidence of horizontal price-fixing included testimony that retail gasoline prices of the name-brand service stations in Houston tended to fluctuate in concert. The witnesses' knowledge of price changes was limited to but five of the approximately 2800 service stations in the Houston area, however. Appellant failed to produce evidence establishing the existence of an intercompany price-fixing agreement, arrangement, or conspiracy at the retail level, or at the wholesale level that might have been reflected

in the alleged fluctuations of retail prices.

(2) As to the vertical price-fixing charge, Appellant, two other ex-dealers, an ex-sales representative, and one of Appellant's station managers all gave testimony as to the pressures applied to Shell dealers seeking compliance with Shell's suggested retail gasoline prices. Appellant admitted that it was always his decision to change his prices. One of his station managers testified that Shell agents had changed prices at his station only once - by one cent per gallon for one day when Shell executives were touring Houston. There was no provision in Appellant's leases or in other dealers' leases requiring compliance with suggested prices. Evidence in support of the vertical price-fixing charge was clearly insubstantial.

(3) Neither was there substantial evidence to support Appellant's Robinson-Patman Act price discrimination claim. The short of the matter is that there was no evidence of discriminatory sales to two different purchasers by the same seller, where the recipient of the lower price was in competition with Appellant. There was no testimony that Shell sold gasoline or other products to any retail competitor of Appellant at a different price than Shell charged Appellant.

(4) There was considerable testimony offered as to claimed illegal tie-ins involving gasoline, trading stamps, customer contests, and T. B. A. Ex-dealers and the ex-sales

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representative testified to the pressure applied to Shell dealers to participate in company programs and to offer company products. No lease provision required such participation. Shell itself did not operate the trading stamp concession. Appellant admitted that he was free to choose to participate in the contests, and that participation actually increased his sales volume. Shell stated in writing to the dealers that they were not required to sell Shell T. B. A. Appellant admitted that he had continued to sell non-Shell products throughout the terms of his leases. The evidence as to illegal tie-ins does not approach the level of such substantiality as to make issues for the jury.

(5) Appellant testified that Shell attempted to force him out of business because it did not approve of the operation of a U-Haul trailer business on Shell property and because of his departures from Shell's merchandising programs. Contrary evidence included Shell's announced policy against multi-station ownership promulgated in 1968, the fact that only one of Appellant's four leases was not renewed by Shell,[2] and the testimony of Appellant that he was motivated to sell his last and most profitable station out of an interest to sue Shell

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2. Appellant's lease on his Bellfort station was not renewed in 1968. Appellant sold his lease to the South Belt station in 1968, cancelled his lease to the College station in 1969, and transferred his Broadway station lease in 1969.

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which exceeded his desire to retain the station.

The record in this case reflects the respective roles of an oil company and its dealer in a competitive market where the oil company must distribute its products within the strictures of the antitrust laws. Plaintiff failed in his effort to prove any one of the alleged violations of those laws with evidence sufficient to warrant submission to the jury.

In the view we take of the case, it is unnecessary to reach questions associated with the District Court's further conclusion that Appellant failed to prove damages.

Affirmed.

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APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

June 23, 1975

TO ALL COUNSEL OF RECORD:

No. 73-4006
L. W. UMPHRES vs.
SHELL OIL COMPANY

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth,
Clerk

By Clare F. Sachs
Deputy Clerk

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APPENDIX "C"

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Fed. Rules of Civ. Proc. rule 50(a), 28 U.S.C.A.:

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the Court granting a motion for a directed verdict is effective without any assent of the jury.

Sherman Act, 15 U.S.C.A. Sec. 1:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: PROVIDED, That nothing contained in sections 1 to 7 of this title shall

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render illegal contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: PROVIDED FURTHER, That the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

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Robinson-Patman Act, 15 U.S.C.A. Sec. 13(a):

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: PROVIDED, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: PROVIDED HOWEVER, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials

on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: AND PROVIDED FURTHER, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: AND PROVIDED FURTHER, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under Court process, or sales in good faith in discontinuance of business in the goods concerned.

Clayton Act, 15 U.S.C.A. Sec. 14:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor or discount from, or rebate upon, such price, on the condition, agreement,

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or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

U. S. CONSTITUTION
AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 1975, three true copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, air mail, postage prepaid, to each of the following counsel of record for Respondent, Shell Oil Company:

Mr. William Simon
Mr. John S. Kingdon
1730 Pennsylvania Avenue, N. W.
Washington, D. C. 20002

Mr. William G. Winters, Jr.
One Shell Plaza
Houston, Texas 77002

Dale E. Muller